

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
WSMH Licensee, LLC	)	
	)	CSR-6766-N
For Waiver of Section 76.92(f) of the Commission's Rules	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 30, 2005**

**Released: September 2, 2005**

By the Deputy Chief, Media Bureau:

**I. INTRODUCTION**

1. WSMH Licensee, LLC, licensee of television broadcast station WSMH (FOX), Flint, Michigan ("WSMH"), has filed a petition for special relief seeking a waiver of the Commission's significantly viewed exception to the network nonduplication rules. No opposition to this petition has been received.

**II. BACKGROUND**

2. Upon the request of a local television station with exclusive rights to distribute a network program, a cable operator generally may not carry a duplicating program broadcast by a distant station.<sup>1</sup> Under Section 76.92(f) of the Commission's rules, however, an otherwise distant station is exempt from the application of the network nonduplication rules if it is considered "significantly viewed" in a relevant community.<sup>2</sup> Station WSMH seeks a waiver of the significantly viewed exception to the Commission's network nonduplication rules so that it may assert network nonduplication protection against television broadcast station WJBK (FOX), Detroit, Michigan ("WJBK") on Comcast Cablevision of Flint, Inc.'s ("Comcast") cable system serving Flint, Michigan. WJBK is considered to be significantly viewed in Genesee County, Michigan, where Comcast's cable system is located.<sup>3</sup>

3. In *KCST-TV, Inc.*, the Commission held that in order to obtain a waiver of Section 76.92(f), petitioners would be required to demonstrate for two consecutive years that a station was no

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<sup>1</sup>See 47 C.F.R. §76.92; 47 C.F.R. §76.101.

<sup>2</sup>47 C.F.R. §76.92(f); see 47 C.F.R. §§76.5(i) and 76.54.

<sup>3</sup>WJBK was deemed significantly viewed in Genesee County on the basis of the Commission's original surveys for significantly viewed status. See *Reconsideration of the Cable Television Report and Order*, Appendix B, 36 FCC 2d 326 (1972).

longer significantly viewed, based either on community-specific or system-specific noncable viewing data.<sup>4</sup> Section 76.5(i) of the Commission's rules requires that for independent stations to be considered significantly viewed, the survey results should exceed a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.<sup>5</sup> For each year, the data must be the result of independent professional surveys taken during two one-week periods separated by at least thirty days, the viewing samples must be distributed proportionately among the relevant cable communities, and not more than one of the surveys may be taken between April and September of each year.<sup>6</sup> The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.<sup>7</sup>

### III. DISCUSSION

4. In support of its petition, WSMH states that it would have network nonduplication rights for FOX programming against WJBK in the community of Flint, Michigan but is prevented from asserting those rights because WJBK is considered to be significantly viewed in Genesee County, where Comcast's cable system is located.<sup>8</sup> WSMH points out that WJBK, which is licensed to Detroit, Michigan, is part of the Detroit DMA.<sup>9</sup> WSMH asserts, however, that WJBK no longer meets the significantly viewed standard in the community of Flint and, as proof, it submits the results of special, community-specific surveys conducted by Nielsen Media Research.<sup>10</sup> WSMH states that Nielsen's surveys are averages of two four-week sweeps in each of two years.<sup>11</sup> The first year survey's audience estimates were based on November 2003/February 2004 data and the second year's estimates on the November 2004/February 2005 data.<sup>12</sup> WSMH states that WJBK's share of total viewing hours in noncable homes in Flint falls far short of the required significantly viewed minimums, within one standard error, as shown in the table below:

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<sup>4</sup>103 FCC 2d 407 (1986).

<sup>5</sup>47 C.F.R. §76.5(i).

<sup>6</sup>See 47 C.F.R. §76.54(b).

<sup>7</sup>See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

<sup>8</sup>Petition at 2.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at Exhibit 1. WSMH states that Nielsen's tabulation was based on a representative sample of over-the-air viewing of WJBK in noncable homes located in the zip codes in Flint.

<sup>11</sup>*Id.* at 3 and Exhibit 1.

<sup>12</sup>*Id.* at Exhibit 1.

<u>Survey Year</u> <sup>13</sup>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Nov. 2003/ Feb. 2004	32	0.53	0.28	10.59	5.30
Nov. 2004/ Feb. 2005	26	0.36	0.31	7.47	5.29

As a result, WSMH requests that the Commission grant its petition so that it can assert its network nonduplication and syndicated exclusivity rights in the subject communities.

5. With respect to the community of Flint, we find that, as required by the Commission's rules, WSMH has provided two sets of community-specific survey results for each year surveyed. In the results obtained by Nielsen herein for the November 2003/February 2004 survey periods, the reported results for WJBK, with one standard error added, indicate a 0.81 percent share of total viewing hours (0.53 reported share + 0.28 standard error) and a net weekly circulation share of 15.89 percent (10.59 reported share + 5.30 standard error). For the November 2004/February 2005 surveys, the reported results for WJBK with the standard errors added are a 0.67 percent share of total viewing hours (0.36 reported share + 0.31 standard error) and a net weekly circulation of 12.76 percent (7.47 reported share + 5.29 standard error). For the share of total viewing statistics, for both periods, the values are less than the 2 percent minimum required when the standard errors are considered. The reported net weekly circulation shares for both years, on the other hand, are above the criterion of 5 percent specified in the rules, even before the standard error is added. However, the criteria for determining whether a station is significantly viewed requires that both the share of total viewing hours and the net weekly circulation share exceed the criteria provided in Section 76.5(i) of the Commission's rules.<sup>14</sup> Accordingly, we find that the submitted audience surveys are sufficient to show that WJBK no longer attains the viewing levels needed to demonstrate significantly viewed status in the community of Flint, Michigan

6. For the above reasons, we find that a grant of a waiver of the significantly viewed exception from the network nonduplication with regard to the community-specific survey for Flint, Michigan, will serve the public interest.

<sup>13</sup>The survey dates of November 2003/February 2004 and November 2004/February 2005 meet the criteria set forth in the rules and *KCST-TV* that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

<sup>14</sup>47 C.F.R. § 76.5(i).

**IV. ORDERING CLAUSES**

7. Accordingly, **IT IS ORDERED**, that the petition filed by WSMH Licensee LLC **IS GRANTED** for the community of Flint, Michigan.

8. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>15</sup>

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Media Bureau

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<sup>15</sup>47 C.F.R. §0.283.